Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22584/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal **Decision & Reasons Promulgated**
On 20 April 2017 **On 24 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR SUKHBIR SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Mahmood, Counsel, instructed by Justmount & Co Solicitors
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India of Sikh ethnic origin. My task in this case is to re-make the decision on the appellant's appeal against a decision made by the respondent in 2015 refusing him settlement as a partner of a person present and

© CROWN COPYRIGHT 2017

settled in the UK. His original appeal against this decision had been dismissed by First-tier Tribunal (FtT) Judge Graham on 9 March 2016. That dismissal was set aside by Upper Tribunal Judge Chalkley in an "error of law" decision sent on 15 February 2017. Judge Chalkley found that the judge had erred in failing to afford the appellant the opportunity of addressing evidence to establish that he is the father of his partner's two children. This failure wrongly led the judge to fail to consider the appellant's family and private life circumstances in the United Kingdom.

2. At the hearing Mr Mahmood pointed out that the appellant had now produced DNA evidence establishing paternity. He submitted that the testing had been carried out in accordance with established procedures. Mrs Aboni said that there were discrepancies in the consent form and that she did not accept that the DNA tests had been carried out properly. She added that if however paternity was established she was prepared to accept the description of family life set out in the appellant's witness statement. After discussion with the parties I stated that I would proceed to hear the parties' submissions on the provisional basis that the appellant had established paternity and for that reason would treat the account of family life set out in the witness statement as agreed.

3. I would only revisit this provisional assessment if the appellant failed to send to the Tribunal and the parties a letter from the DNA testing body, producing the photograph of the man who provided the DNA sample to the nurse. That would enable a quick check to be made as to whether that photo was indeed a photo of the appellant.

4. On the above basis Mr Mahmood's submission to me was that I should find that the appellant and his partner and family could relocate to either Afghanistan or Pakistan. As regards Afghanistan, he emphasised that she had fled that country due to the armed conflict; it was not reasonable to expect her and her family to relocate there. As regards India, the appellant's wife and children would have to apply for a spouse/dependant visa and it was uncertain whether they would be granted one. The appellant's wife had never travelled to India. The appellant's children were born in the UK (in July 2012 and August 2014) and even though neither has resided in the UK for seven years, they have never been abroad. The appellant has no house, no land, he would be starting from scratch having to provide for his wife and two children. In 2018 the appellant's wife could be granted ILR but it was not realistic she could meet all the requirements of the Immigration Rules as she is on welfare and has medical difficulties. On return she would face the same difficulties in being unable to meet the financial requirements of the Rules. Separation from his wife would be disproportionate.

5. Mrs Aboni said that it was unclear why the appellant's partner had been granted DL but it was most likely legacy considerations. Her claim for asylum vis-à-vis Afghanistan had not been accepted. Her only reasons for not wanting to go back to India were economic. Mrs Aboni asked me to conclude that the appellant did not meet the requirements of the Immigration Rule and that in assessing the appellant's

situation outside the Rules I should attach adverse weight to the fact that he had established his family and private life at a time when his immigration status was precarious. The best interests of the children lay with their continuing to live with their parents in Afghanistan or India. There was no reason they could not adapt to life in India. The children were not British citizens and did not have settled status.

<u>My Assessment</u>

6. In assessing this case I take account of all the evidence, including the recent witness statements of the appellant and his wife and their friends. It is clear that the appellant could not meet several relevant requirements of the Immigration Rule. His wife did not have settled status; his application failed to submit evidence to show the couple had lived together for two years. He had insufficient residence to qualify under paragraph 276ADE. He had failed to establish that there would be very significant obstacles to his reintegration into Indian society. The children were not British citizens and had not resided in the UK for seven years. Accordingly the appellant could only succeed if able to show that there were compelling circumstances outside the Rules warranting a grant of leave to remain on Article 8 grounds.

7. I accept that the appellant has established he has family life ties with his partner and their two children. I also accept that having lived in the UK for over fourteen years he has established links with the UK. However, I do not consider, however, that the respondent's refusal of leave to remain was disproportionate.

8. As regards the appellant's likely circumstances in India, it is clear from the evidence that he has family there and that he has links of culture, language and tradition with that country. Even if he cannot turn to close family members for support, it is reasonably likely he will be able to find employment. Whilst he has resided in the UK since either 2002 or 2002 he has never had valid leave to remain and all his private and family life ties have been formed at a time when his immigration status was precarious.

9. As regards the appellant's partner, I am prepared to accept that she and the appellant have a genuine and subsisting relationship and (despite lack of requisite evidence under the Rules) have lived together for two years. However, she is not a British citizen or a person present or settled in the UK. Unless of her own choice she decides to remain in the UK for as long as she has DL, it is reasonably open to her to accompany the appellant to India, taking their children with them. Whether or not she is able to return to Afghanistan, I am satisfied that there are no insurmountable obstacles to her relocating with the appellant in India. She is not a national of India but it is probable she will be able to obtain entry and be able to reside in India on the basis that she is the spouse of an Indian national. Although she is a national of Afghanistan, she is of Sikh ethnic origin and India contains the highest indigenous settlement of persons of Sikh ethnic origin in the world. She (like her two children) has DL until 18 February 2018 but it remains that her relationship with the appellant

was commenced when her immigration status was precarious. She suffers from persistent back and leg pain, but she will have access to medical treatment in India.

10. I take into account that the appellant has two children who have lived all their lives in the UK, having been born in July 2012 and August 2014 respectively. Like their mother, they have DL until February 2018. However neither has lived in the UK for seven years and neither is a British citizen or a person with settled status. I consider that in their case their best interests lie primarily with their parents and being able to remain living with them as a family unit. The evidence does not establish that they have formed very significant ties outside their immediate family. It is not suggested that they have been raised with no awareness of and exposure to Sikh culture and traditions.

11. Earlier I noted that I would proceed to decide the case on the provisional basis that the appellant has established paternity of the children concerned. At the date of finalising my decision, I am not aware of any response to my directions. Nevertheless it is not necessary for me to reach a firm conclusion on paternity because even on the assumption that the appellant has established paternity, I have not found that his appeal can succeed.

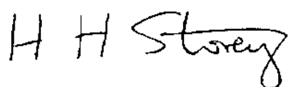
For the above reasons:

The decision of the FtT judge has already been set aside for material error of law.

The decision I re-make is to dismiss the appellant's appeal.

No anonymity direction is made.

Signed Date: 21 May 2017



Dr H H Storey
Judge of the Upper Tribunal